Southern Stubbornness:

The Persistence of Voting Discrimination After-*Shelby County v Holder*

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On March 15, 1965, Dr. Martin Luther King's friends watched him cry for the first time as King listened to President Lyndon B. Johnson espouse the civil rights anthem "we shall overcome"[1] as he urged Congress to pass voting rights legislation.[2] King's tears signified the importance of Johnson's speech and just a few months later, the Voting Rights Act (VRA) was signed into law to become what legal scholars have described as "one of the most remarkable and consequential pieces of congressional legislation ever enacted". [3]

Confronting decades of disenfranchisement, the VRA effectually targeted the persistent mass discrimination of African Americans nationwide by permanently outlawing voting practices or procedures that discriminated because of race, color, or membership in one of the language minority groups.[4] Section 4 of the VRA identified jurisdictions that maintained discriminatory prerequisites to voting registration as of November 1, 1965 and had less than 50% voter registration in the 1964 presidential election.[5] Section 5 prohibited the "covered" jurisdictions from making any voting changes until given approval by federal authorities in a process known as preclearance.[6] In 1965, six states required preclearance: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Although sections 4 and 5 were initially set to expire after five years, Congress issued extensions in 1970, 1975, and for 25 more years in 1982.[7] Additionally, when President George W. Bush signed another 25-year extension into law

[1] http://www.npr.org/2012/11/11/164894065/leading-in-crisis-lessons-from-lyndon-johnson
[2] https://www.usatoday.com/story/theoval/2015/03/15/lyndon-johnson-selma-congress-voting-rights-act-we-shall-overcome/24806605/
[3] Katz, Ellen D., Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt. "Documenting discrimination in voting: Judicial findings under section 2 of the voting rights act since 1982." *University of Michigan Journal of Law Reform* 39, no. 4 (2006).
[4] Section 2 Of The Voting Rights Act. (2015, August 8). Retrieved April 26, 2017, from https://www.justice.gov/crt/section-2-voting-rights-act
[5] Shelby County, Alabama, Petitioner v. Eric H. Holder, JR., Attorney General, Et Al. (June 25, 2013) (LexusNexus, Dist. file).
[6] ibid
[7] ibid

in 2006 and declared, "[b]y reauthorizing this act, Congress has reaffirmed its belief that all men are created equal,"[8] the VRA's place within U.S Policy appeared eternal. However, just seven years later, the Supreme Court would consider whether section 4 of the VRA was still constitutional in *Shelby County v Holder (2013)*.

When delivering the Court's opinion in *Holder*, Chief Justice Roberts concluded that while voting discrimination still existed in some cases, voter turnout and registration had reached parity in the South and blatant evasions of federal laws were rare.[9] In the eyes of the majority, nearly fifty years after the VRA's passage, "things [had] changed dramatically", which ultimately lead the court to conclude that section 4 of the VRA, was unconstitutional in a 5-4 vote.[10]

Yet, the Supreme Court's conclusion of changing times was only a partly accurate reflection of the historical events that initially began in the mid-19th century and eventually led to the VRA's enactment. Beginning around 1865 and continuing for over thirty years, Southern resistance utilized violence, electoral fraud and constitutional rewrites to evade federal voting laws and disenfranchise African Americans. Table 1 shows the progression of Southern resistance.

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[8] "President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006." National Archives and Records Administration. 2006. https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html.
[9] See supra note 5
[10] Ibid

Table 1:

Three Phases of Southern Resistance

Phase	Period	Length	Status of vote	Resistance modality
I	Reconstruction	1867-early 1870s	Voter enfranchisement	Violence
II	Redemption	Mid 1870s-mid 1890s	Vote manipulation	State law; Election fraud
III	Restoration	1890-1908	Voter elimination	State Constitutions

Note: Adapted from: Perman, M. (2003). Struggle for mastery: Disfranchisement in the South, 1888-1908. Univ of North Carolina Press.

After years of opposition that began with disenfranchisement activists in the 1890's and continued through the civil rights movement, Congress eventually enacted the VRA in 1965 to specifically challenge the southern circumvention of Federal law and reinforce voting rights for all people. Today, minority voters register and turn out at rates that align favorably with the rates reported both nationally and in covered jurisdictions and voters more frequently elect minority candidates to local, state, and federal office than the 1960s.[11] While there have been several changes to the voting landscape that may signify progress, after the Shelby County decision southern states are continuing to devise laws that sidestep Federal voting legislation and aim to disenfranchise African Americans. Therefore, while times have indeed changed in some respects, they have also remained static in several ways. An analysis of the discriminatory laws that initially led to the VRA will find similarities to contemporary laws, reveal the stubbornness of southern states to honor federal voting laws and exhibit how the Supreme Court wrongly invalidated section 4 of the VRA even as discriminatory practices have spread beyond the South.

[11] Katz, E. D. (2008). Mission Accomplished?

I. *SHELBY COUNTY v HOLDER* CASE BACKGROUND

The landmark *Shelby County v Holder* case began in 2010 as Shelby County, Alabama, challenged sections 4 and 5 of the of the VRA, claiming that the legislation was unconstitutional because the law required some, but not all, states and counties to obtain preclearance from federal authorities before the implementation of new voting practices or procedures.[12] In 2011, the district court dismissed Shelby County claims and upheld that sections 4 and 5 were constitutional, which a Court of Appeals later confirmed in 2012.[13]Shelby County's claims navigated to the Supreme Court in 2013, which just a few years earlier in *Northwest Austin Municipal Util. Dist. No. One* v. *Holder* (2009) had signaled an apparent readiness to declare preclearance as unconstitutional by stating that section 5 "raise[s] serious constitutional questions".[14] Thus, fifty years after the VRA dramatically shaped the history of the United States; the Supreme Court was set to make a landmark ruling on whether one of the main provisions was still needed and legal.

A. The Arguments of the Majority

As Chief Justice Roberts opened the majority opinion that section 4 of the VRA was unconstitutional, he acknowledged the historical necessity for the legislation. Drawing on evidence compiled by Congress in 2006, Justice Roberts argued that the continued need for the VRA had diminished as Congress found that significant progress had transpired in the elimination of barriers to minority registration, turnout and representation.[15] Additionally, with African American voting registration exceeding white registration by percentage in five of the six original "covered" states and improved in the sixth state in the 2004 presidential election

[12] Ibid.
[13] ibid
[14] Carter, W. M. (2011). The Paradox of Political Power: Post-Racialism, Equal Protection, and Democracy.
[15] See supra note 5

(table 2), the majority concluded that voting had reached parity. Table 2 exhibits a comparison of the voting registration results in 1965 and 2004. Building on the appearance of voting parity, the majority argued that the preclearance requirement relied on facts from 1965, which had subsequently become outdated. While *Katzenbach v South Carolina* (1966) originally upheld the VRA as constitutional by concluding that "exceptional conditions can justify legislative measures not otherwise appropriate",[16] the majority contended that "exceptional conditions" no longer existed and as a result, the continuation of the preclearance provisions was indeed unconstitutional.

Table 2:

A Comparison of Voting Registration in 1965 vs 2004

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

Note: Retrieved from: Shelby County, Alabama, Petitioner v. Eric H. Holder, JR., Attorney General, Et Al. (June 25, 2013) (LexusNexus, Dist. file).

B. The Arguments of the Dissent

While writing for the dissent, Justice Ginsburg accurately conceded that while voting progress in regards to formal access to the franchise had occurred, the VRA was still effectively blocking discriminatory efforts that sought to limit minority influence in the political process.[17]

[16] ibid
[17] ibid

To illuminate the continuation of discriminatory practices, Justice Ginsburg also relied on data gathered from Congress during the 2006 reauthorization, which revealed that between 1982 and 2004, Congress found more Department of Justice (DOJ) objections (690) than there were between 1965 and 1982 (490).[18] Additionally, between 1982 and 2004, the DOJ and private plaintiffs succeeded in more than 100 cases to impose the preclearance requirements.[19] Despite the success of the DOJ and private plaintiffs, Justice Ginsburg warned that litigation had limitations because legal action occurred only after the fact and consequently an illegal voting scheme could be in place for several election cycles.[20] Furthermore, Justice Ginsburg continued to dispose of the majority's main argument that the VRA was outdated by asserting, "Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions", which is demonstrated through section 3 of the VRA.[21] Under this section, the DOJ permits "covered" jurisdictions to "bail out" or no longer require preclearance if they demonstrate compliance with the VRA for ten years and have undertaken efforts to eliminate intimidation and harassment of voters.[22] Conversely, jurisdictions that maintain voting procedures that intend to discriminate can be "bailed-in" by the DOJ under section 3 of the VRA and subsequently required to seek preclearance before the implementation of any voting changes.[23] Since 1984, the "bailout" provision has resulted in the release of nearly 200 jurisdictions, with the DOJ consenting to every eligible bailout application.[24] Contrarily the "bail-in" mechanism has also worked, as section 3 has added several new jurisdictions and states to the preclearance requirements, including Alaska

[18] Ibid
[19] Ibid
[20] Ibid
[21] Ibid
[22] Ibid
[23] Wiley, P. M. (2014). Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights after Shelby County v. Holder. *Wash. & Lee L. Rev.*, *71*, 2115.
[24] Ibid

Arizona, and Texas in 1972.[25] Table 3 summarizes the key provisions in the VRA at the time of the Shelby county decision.

Table 3

Key Provisions of the Voting Rights Act

Section	Description
2	Permanently outlaws voting practices or procedures that discriminate because of race, color, or membership in one of the language minority groups
3	Permits the DOJ to "bail out" jurisdictions that have complied with the VRA and "bail-in" jurisdictions that maintain voting procedures that intend to discriminate
4	Identified jurisdictions that must seek preclearance
5	Prohibited "covered" jurisdictions from making any voting changes until given approval by federal authorities

With the DOJ still rejecting hundreds of discriminatory practices, the limitations of court litigation, and the bail in/out mechanism, Justice Ginsburg concluded that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet".[26] Nevertheless, the majority opinion forged ahead with a decision that dismissed the claims of the dissent and disregarded the historical events that began to unfold nearly 150 years earlier. Beginning with Reconstruction and continuing through the early 1900s, an analysis of the events that initially lead to the VRA will demonstrate the history that the majority erroneously neglected.

II. **Reconstruction**

As the Civil War ended in 1865, disenfranchisement attempts began almost immediately as the United States embarked on a period of rebuilding, which expanded the rights of African

[25] Jurisdictions Previously Covered By Section 5. (2015, August 6). Retrieved from https://www.justice.gov/crt/jurisdictions-previously-covered-section-5
[26] See supra note 5

Americans and aptly became known as Reconstruction.[27] Several constitutional amendments helped define the Reconstruction era, including the Thirteenth and Fourteenth, which abolished slavery and provided equal protection under the law for all people born or naturalized in the United States.[28] Additionally, when the Fifteenth amendment was ratified in 1870 and provided that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude",[29] the doors to political participation were seemingly open to all races. Yet, in reality, African Americans only minimally experienced political freedom in the South as a result of southern resistance that was determined to maintain "the real laws of the South", [30] where white supremacy reigned freely. Thus, as Reconstruction commenced, violence emerged as the opening tool to evade the fifteenth amendment and disrupt African American voting rights and would later give way to electoral fraud and constitutional rewrites that would disfranchise African Americans until the 1960's.

A. The Ku Klux Klan

At the center of the southern violent climate was a burgeoning group of secret societies, including the Knights of White Camelia, the Constitutional union guards, the pale faces, the white brotherhood, the council of safety, the 76' Association and the Ku Klux Klan (KKK).[31] The most powerful of these groups was the KKK, which used intimidation, force, ostracism, bribery, arson and even murder to destroy the Republican controlled governments,[32] which the

[27] Franklin, J. H., & Higginbotham, E. B. (1969). From slavery to freedom (p. 262). New York: Vintage Books.
[28] White, G. E. (2014). THE ORIGINS OF CIVIL RIGHTS IN AMERICA. Case Western Reserve Law Review, 64(4), 755-816.
[29] Staff, L. (2009, November 12). 15th Amendment. Retrieved from https://www.law.cornell.edu/constitution/amendmentxv
[30] Wilson, W. (1918). A history of the American people (Vol. 10). Harper & brothers.
[31] See supra note 25
[32] ibid

group deemed were fraudulently manipulating African American voters for political advantage.[33] Accordingly, as the KKK terrorized the South in 1869 and 1870, voting became nearly impossible for African American voters.[34]

While some republicans initially viewed the enactment of the 15th amendment as the end of national politics that focused on race, many quickly realized that without enforcement, the fifteenth amendment was rapidly becoming inadequate.[35] Hence, beginning in May 1870, the Republican-controlled Congress passed a series of laws known as the Enforcement Acts, which permitted the Federal Government to intervene if necessary to arrest, and punish those accused of organized harassment or intimidation of African American voters.[36] Subsequently, in 1871 at the behest of his attorney general, President Ulysses S. Grant sent federal troops to South Carolina, resulting in hundreds of arrests and the exile of a few thousand Klansmen.[37] The Attorney General spared those who confessed and identified the leaders of the violence, while the worst offenders stood trial, which frequently came before predominately African American juries.[38] By 1872, President Grant's apparent willingness to send troops to the South established Federal authority and destroyed the Klan's influence, which lead to a dramatic reduction in violence. Hence, for a brief moment, the South seemed to be at peace, yet within a year, the terror resumed.[39]

B. *United States v Cruikshank* (1876)

[33] See supra note 28
[34] Wang, X. (2012). The trial of democracy: Black suffrage and northern Republicans, 1860-1910. University of Georgia Press.
[35] ibid
[36] Goldman, R. M. (1990). *A Free Ballot and a Fair Count: The Department of Justice and the Enforcement of Voting Rights in the South, 1877-1893* (Vol. 6). Fordham Univ Press.
[37] Foner, Eric. Reconstruction: America's unfinished revolution, 1863-1877. Harper Collins, 2011.
[38] Ibid
[39] ibid

In April 1863, southern violence escalated once again in Colfax, Louisiana, as a group of armed whites shot, burned and killed hundreds of African Americans who refused to leave a county courthouse, resulting in what historian Eric Foner referred to as the "the bloodiest single act of carnage in all of Reconstruction".[40] Consequently, the justice department indicted ninety-six men, including W.J Cruikshank.[41] However, only three convictions eventually resulted due to blatant obstruction that included the beatings and murders of potential witnesses.[42]

On June 27, 1874, Justice Joseph P. Bradley announced the Circuit Court's decision to overturn the convictions, reasoning that the fourteenth amendment, which provides equal protection to all United States citizens, prohibited only the states and not private individuals from denying these rights.[43] Justice Bradley also reasoned that the federal prosecutors failed to allege explicitly that the defendant's actions were the result of racial hostility, which the opinion determined was necessary for claims of a conspiracy to deprive African Americans of the right to vote.[44] The Circuit Court's decision led Louisiana Governor William Pitt Kellogg to conclude that the ruling effectually, "establish[ed] the principle that hereafter no white man could be punished for killing a Negro."[45] The court's ruling had immediate implications on the ground as Whites celebrated the court's decision in Colfax and subsequently slit the throat of Frank Foster, an innocent African American man that happened to be walking along the road.[46] When the Supreme Court later upheld Bradley's decision in *United States v Cruikshank* (1876), the ruling

[40] ibid
[41] See supra note 34
[42] Pope, J. G. (2014). Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon.
[43] ibid
[44] ibid
[45] ibid
[46] ibid

ostensibly confirmed a green light to acts of terror where local officials could not or would not enforce the law.[47]

Following *Cruikshank,* African Americans essentially lost their ability to exercise or defend their constitutional rights throughout the South as the result of violence. Revealingly, the only areas of remaining voting strength for African Americans remained in areas where they were a small segment of the population and thus offered little threat to white supremacy.[48] Therefore, while the post-Civil War United States introduced increased freedom for African Americans, their new rights were quickly diminishing as Reconstruction ended in 1877, which foreshadowed a developing pattern.

III. Redemption

Although the political ramifications of violence were certainly significant, perhaps no other factor contributed more to the decline of African American voting in the 19th century than electoral fraud.[49]As was the case with the proliferation of violence, a Supreme Court decision was seemingly complicit in the expansion of electoral fraud. In *United States v Reese (1875)* the Supreme Court heard the cases of two Kentucky election officials who denied an African American man the right to vote despite his possession of an affidavit revealing that he had offered to pay the poll tax but had been denied by the city's tax collector.[50] Consequently, authorities arrested the election officials for violating sections 3 and 4 of the enforcement acts, which outlawed several specific tools that frequently barred African Americans from voting.[51] However, in 1876 the Supreme Court dismissed the charges, ruling that sections 3 and 4 of the

[47] ibid
[48] ibid
[49] Kousser, J. M. (2000). Colorblind injustice: Minority voting rights and the undoing of the second reconstruction. Univ of North Carolina Press.
[50] See supra note 32
[51] Ibid

enforcement acts were unconstitutional because the sections did not explicitly mention race and noted that the only power to protect citizen's right to vote was the fifteenth amendment.[52] Hence, with the Supreme Court's apparent unwillingness to protect the voting rights of African Americans and the Democrats regaining control of the South, an era of massive electoral fraud ensued from the mid-1870s-mid 1890s to circumvent the fifteenth amendment, which had enfranchised over a million African Americans and awakened thousands of previously dormant whites.[53] Similar to the previous era, which featured mass violence, the goal of electoral fraud was to redeem the South and reassert white supremacy, which had proven elusive since the end of the civil war.[54]

Gerrymandering

One the most commonly utilized means to manipulate votes in the South was gerrymandering or the manipulation of electoral districts.[55] In several Southern states, gerrymandering resulted in the division of areas with large African American populations or "packed" districts where African Americans were crowded into one district in an effort to limit the number of seats for blacks or black-influenced white officeholders, which rendered the Black vote less effective.[56] In 1881, South Carolina created a district, popularly dubbed the "Boa Constrictor" because the district cut through county lines and looped through back alleys picking up every possible Black citizen, while avoiding as many whites as possible.[57] The results of the gerrymandered "Boa Constrictor" was a district that was 82 percent Black. Therefore, while more than sixty percent of South Carolina's residents were Black in the 1880s, only one district

[52] See supra note 46
[53] Perman, M. (2003). Struggle for mastery: Disfranchisement in the South, 1888-1908. Univ of North Carolina Press.
[54] ibid
[55] Kousser, J. M. (1981). The undermining of the first reconstruction: lessons for the second.
[56] ibid
[57] See supra note 48

(the Boa Constrictor) had a Black majority.[58] Similarly, gerrymanders created the "shoestring" district in Mississippi, which was 77.5% Black and ran all the way through the northern and southern border of the state. Moreover, gerrymanders also split Mississippi's large Black population into several districts that ranged from 49.2 percent to 53.8 percent black. While Blacks were still the majority in some of these districts, dispersing the Black population across several districts made other forms of electoral manipulation more manageable.

A. Ballot Fraud

During the late 19th century, several forms of fraud were practiced throughout the South including the desecration of ballots after they had been cast and "Ballot box stuffing", which meant replacing valid ballots with phony ballots for the desired candidate.[59] Additionally several states also used "Tissue" or "Kiss" ballots in an effort to secure more votes.[60] The "Tissue" ballot resembled a typical democratic ballot, but in reality consisted of several thin identical ballots that stuck loosely together.[61] After an election, officials would shake the ballot box to ensure that the ballots would separate and therefore create multiple ballots for the preferred candidate.[62] When Federal officials determined that the number of voters exceeded the amount registered, they would draw out ballots until the numbers matched. However, drawing out ballots was unquestionably ineffective because of the large amount of tissue ballots.

B. Legal Vote manipulation

In addition to the illegal methods that pervaded the South, Southern white democrats also employed strategies that were legal at the time to manipulate the voting strength of African

[58] Ibid
[59] Ibid
[60] See supra note 34
[61] Ibid
[62] Ibid

Americans without explicitly denying them the right to vote.[63] Although the scheme varied depending on the size of the Black population, each strategy operated with the purpose to minimize the office holding by Black or Black-influenced white officeholders.[64] In areas where African Americans were in the minority, at-large elections was effective at denying representation.[65] If the African American population was large, bonds for officeholders were set high to dissuade only the most affluent from running.[66] Additionally, election officials would also work around large African American populations by combining polling locations to create long distances for voters to travel and long lines when they arrived.[67]

Meanwhile, as illegal and legal devices dispersed through the South, new ballot laws began to sweep across the nation in 1890 and 1891.[68] Although the South was initially slow to react, Southern states eventually realized that implementing the new ballot laws, which required voting to occur in secret, would offer another method to reduce the number of votes cast by African Americans given that they were more likely to be illiterate.[69] Table 4 reveals the literacy rates for African Americans and Whites in the South in the 1900s.

Table 4:

Percentage of Adult Males who were Illiterate, by Race, 1900

State	White	African American
Alabama	13.6	59.5
Georgia	11.7	56.4
Louisiana	18.0	61.3
Mississippi	8.2	53.2
South Carolina	12.2	54.7

[63] See supra note 46
[64] ibid
[65] ibid
[66] ibid
[67] See supra note 50
[68] ibid
[69] See supra note 46

Virginia	12.1	52.5

Note: Adapted from Kousser, J. M. (2000). Colorblind injustice: Minority voting rights and the undoing of the second reconstruction. Univ of North Carolina Press

In the years following the United States Civil War, Southern White democrats used violence to regain control of the South and electoral fraud to manipulate an electoral system that remained from Reconstruction. As the 1890s dawned, Southern democrats proposed plans to continue their pattern of subverting federal laws, while also undoing the gains initially promised to African Americans during Reconstruction.[70]

IV. Restoration

After an era of voter manipulation that greatly limited the political participation of African American voters, several Southern states began embarking on a process that would finally eliminate the gains of African Americans and restore the pre-reconstruction status quo.[71] Rather than seeking relief through state statutes, the South sought a more permanent remedy and thus pursued plans to rewrite their constitutions.[72] Although the states of the former confederacy had rewritten their constitutions more often any other than states since the founding of the republic, the process of amending a state constitution was no easy task.[73] In addition to a lengthy voting process for approval, a rewrite entailed a delicate charge of limiting the arousal of the people or their political leaders that the initiative sought to exclude as well as the federal government, which might act if the new constitutions offered blatant violations to federal laws.[74] Yet, despite these obstacles, the South imagined an ambitious plan that would no longer require violence or fraud, but instead as Frank S. White would later state at the Alabama convention in

[70] See supra note 50
[71] ibid
[72] ibid
[73] ibid
[74] Ibid

1901, "we'll disfranchise [African Americans] by law".[75] Hence, as the era of Restoration commenced, the South was determined to reinstate the unquestioned white supremacy that flowed freely before Reconstruction and Mississippi readied to take the lead.

A. Mississippi Exclusion

In August 1890, Mississippi became the first state to embark on a constitutional rewrite with an objective to eliminate Black voters from registering.[76] Specifically, Mississippi's 1890 convention lead to changes that placed extraordinary discretionary power with election registrars.[77] The new Mississippi constitution was purposively vague and did not outline specifically what the registrars could and could not do and whom they could and could not register, which in essence gave these registrars the power to register or dismiss whomever they wanted.[78] Mississippi deliberately designed a vague system to avoid explicitly undercutting the fifteenth amendment and the U.S constitution.[79] In addition to granting registrars considerable power, Mississippi's constitutional rewrite required that residents live in the precinct for 1 year; it implemented a poll tax, which required annual payments for two years prior to the election; and it permitted people to register only after they demonstrated "sufficient" understanding of the state constitution.[80] Recognizing that these changes would affect white voters, Mississippi and later several other southern states implemented saving clauses or loopholes that exempted whites who were unable to meet these requirements.[81] By implementing several changes to the state constitution, Mississippi accomplished the goal of limiting who could register to vote, and the

[75] ibid
[76] See supra note 34
[77] Riser, R. V. (2010). Defying disfranchisement: Black voting rights activism in the Jim Crow South, 1890-1908. LSU Press.
[78] ibid
[79] Ibid
[80] See supra note 34
[81] See supra note 59

registration rates among Black voters went from an already small 30% down to virtually nothing.[82]

With registration numbers dwindling, *Williams v. Mississippi (1898)* demonstrated the legal challenges of Mississippi's constitutional changes. Yet, in a unanimous decision, the court ruled that the provisions enacted at Mississippi's state constitution, "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them".[83] Therefore, with the Supreme Court determining that Mississippi's changes were indeed constitutional, a path emerged for Southern states to follow Mississippi's lead and engage in massive disenfranchisement campaigns.

B. **Constitutional Disenfranchisement**

In 1895, South Carolina followed Mississippi's lead by enacting a new constitution that required two years of residence, a poll tax, the ability to read and write any section of the constitution, ownership of property worth three hundred dollars and disqualified convicts.[84] Denouncing Mississippi's constitution for placing too much power in the hands of election registrars, Louisiana had an alternative plan for disenfranchisement.[85] In 1898, Louisiana introduced the grandfather clause, which allowed illiterate and poor men to register if their father or grandfathers voted at any time before January 1, 1867, or before the passage of the reconstruction amendments.[86] In 1902, only 2.9% of adult Black males could vote and therefore, the new Grandfather clause permitted Louisiana to exclude nearly all Blacks in Louisiana without eliminating any whites.[87] Acknowledging the potential legal battles that may soon arise

[82] See supra note 34
[83] Williams v. Mississippi 170 U.S. 213 (1898).
[84] See supra note 25
[85] Riser, R. V. (2010). Defying disfranchisement: Black voting rights activism in the Jim Crow South, 1890-1908. LSU Press.
[86] ibid
[87] See supra note 32

to challenge the state's new device, Louisiana placed a time limit on their grandfather clauses and hoped to get whites registered before legal challenges persisted.[88] Essentially, once the grandfather clause removed people from the voting rolls, the mechanism became less necessary because white people were on the voting rolls and African Americans were not.[89]

In 1901, Alabama also joined the pattern of constitutional disenfranchisement. Using Louisiana's grandfather clause as a model, Alabama implemented an "old soldier" plan, which offered lifetime suffrage to soldiers, sailors, and their descendants if they participated in any of America's wars in the nineteenth century.[90] In addition to the "old soldier law, Alabama also implemented residence, poll tax, literacy and property requirements, and mandated a record clear of several criminal convictions.[91] Governor Joseph F. Johnson made clear the racial intent of Alabama's law as he asserted, "after an experience of thirty years…it has been demonstrated that as a race, he [African Americans] is incapable of self-government and the intelligent exercise of the power of voting." Accordingly, as Virginia in 1902 and later Georgia in 1908 revealed their racial motives as well as the states developed their constitutions to follow the model of Alabama.

By 1910, Constitutional provisions effectively disenfranchised African Americans throughout the South,[92] culminating a long process of Southern resistance that had begun with mass violence during reconstruction and later shifted toward expansive electoral fraud during Redemption (table 1). With favorable Supreme Court rulings during each step of the process,[93] Southern resistance restored white Supremacy to full power and nearly all traces of Reconstruction disappeared. Until Congress enacted the VRA in 1965, African Americans were

[88] Greenblatt, A. (2013, October 22). The Racial History Of The 'Grandfather Clause' Retrieved from http://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause
[89] ibid
[90] See supra note 50
[91] ibid
[92] See supra note 25
[93] See supra note 46

essentially unable to vote in the South despite the Fifteenth Amendment that seemingly promised voting rights to all people.

V. After Shelby County

Following the Shelby County decision, several states once again challenged the status of voting rights. In 2016, the courts invalidated voting suppression methods in North Carolina, Kansas, North Dakota, Wisconsin and Texas, revealing that discriminatory voting practices are no longer as confined to the South.[94] However, the growth of discriminatory laws outside of the Southern states formerly covered under the VRA does not confirm the Supreme Court's ruling in Shelby County because section three of the VRA still permits the DOJ to bail-in states to the preclearance requirements if they maintain voting procedures that intend to discriminate. Yet, section 3 continues to be limited as Justice Ginsburg noted in her dissent in *Holder* because discriminatory laws may be in place for several election cycles before they are changed. The shortcomings of section 3 materialized in 2017 as Texas faced the possibility of bail-in for a discriminatory law that the state implemented in 2013 and was therefore in place for several years. With the existence of Section 4, Texas and several other Southern states with a history of voting discrimination would have been unable to make voting changes without preclearance and thus the proliferation of many new discriminatory laws was avoidable. The Supreme Courts failure to recognize the continued need for Section 4 of the VRA has resulted in the reemergence of discriminatory voting laws that are sweeping the South and beginning a new process of mass disenfranchisement that are once again designed to evade the fifteenth amendment and is massively disenfranchising African Americans.

[94] Domonoske, C. (2016, August 02). As November Approaches, Courts Deal Series Of Blows To Voter ID Laws. Retrieved from http://www.npr.org/sections/thetwo-way/2016/08/02/488392765/as-november-approaches-courts-deal-series-of-blows-to-voter-id-laws

A. Voter Identification Laws

One of the most common contemporary tools to elude federal voting protections is the requirement of photo identification, which several states have claimed is necessary to contest voting fraud, despite evidence that fraud is exceptionally rare.[95] The true discriminatory intent of voter ID laws have become increasingly visible as several Southern states enacted them following *Shelby County v Holder*. Although Alabama passed a voter ID law prior to the Shelby county decision, implementation did not begin until a few days after the court's ruling,[96] which subsequently permitted Alabama to make voting changes without seeking preclearance. While the office of the Alabama Attorney General reasoned that the delay between enactment and implementation was the result of state efforts to develop a free ID program, [97]Alabama's history of voting discrimination suggests alternative reasons for the delay. Between 1982 and 2013, Alabama sought preclearance on forty-eight voting changes, including five attempts to change the state's voter ID laws, which Federal officials promptly denied each time.[98] With the Shelby County case beginning in the district courts in 2010, Alabama seemingly has an incentive to wait for the outcome of that ruling. Furthermore, the discriminatory intent of Alabama's Voter ID laws became clearer as Alabama announced that the state would be closing thirty-one offices that issued driver's licenses across the state. With many of the offices closing in majority Black counties, pressure mounted about whether the law aligned with Alabama's past history of racial discrimination.[99] When Alabama Governor, Robert Bentley later reversed the closures, he cited

[95] Levitt, Justin. 2007. "The Truth about Voter Fraud." The Brennan Center for Justice. New York, NY. (http://www.brennancenter.org/publication/truth -about-voter-fraud), accessed March 24, 2017.
[96] Ibid
[97] Kim Chandler, *Alabama Photo Voter ID Law to Be Used in 2014, State Officials Say*, AL.CO
[98] Voting Determination Letters for Alabama. (2015, August 7). Retrieved from https://www.justice.gov/crt/voting-determination-letters-alabama
[99] http://www.governing.com/topics/politics/drivers-license-offices-will-reopen-on-limited-basis.html

budgetary reasons and claimed that charges of racial motivations were "simply not true".[100] Additionally, Bentley noted, "Alabama has provided numerous options by which citizens can obtain a voter ID, and the closure of the Driver's License offices should not be seen as a hindrance to someone's ability to do that."[101] Governor Bentley accurately referred to Alabama's efforts to provide free Photo ID's to any voter who was unable to obtain one of the approved forms, however, a "free" ID does not necessarily come without costs. When accounting for expenses for documentation, travel, and waiting time, "Free ID's can cost voters about $75 to $175,[102] which when adjusted for inflation, is a substantially greater cost than the $1.50 poll tax that the 24th amendment outlawed in 1964.[103] Furthermore, obtaining a free ID also has racial implications; as African Americans are more likely to live further away from locations that issue free ID's, which increases the burden.[104]

With Alabama's Voter ID law seemingly tracking with past devices ruled unconstitutional, the Greater Birmingham Ministries and the Alabama chapter of the NAACP filed a lawsuit and sought an injunction in 2015, asserting that the law violates Section 2 of the VRA and the Fourteenth and Fifteenth Amendments.[105] However, on February 17, 2016, the district court denied the Plaintiffs' request for a preliminary injunction, citing that other states have upheld similar cases across the country under previous voting rights challenges.[106] Although the district court's explanation is accurate, the reasoning is inadequate. During the 19th century, several courts also upheld laws that enabled mass disenfranchisement of African

[100] http://governor.alabama.gov/newsroom/2015/10/governor-bentley-issues-statement-status-alea-rural-drivers-license-offices/
[101] ibid
[102] Sobel, R (2014) The High Cost of 'Free' Photo Voter Identification Cards
[103] Ibid
[104] Gaskins, K., & Iyer, S. (2012). The challenge of obtaining voter identification. Brennan Center for Justice, 158-167.
[105] Erickson, A. (2017). Selma to Selma: Modern Day Voter Discrimination in Alabama. *Law & Ineq.*, *35*, 75-131.
[106] ibid

Americans and therefore what other states did was irrelevant. The district court in Alabama erred by not interpreting whether the law was indeed discriminatory.

While Alabama's laws demonstrates the discriminatory intent of voter ID laws after *Shelby County v Holder*, even before the court's ruling, several states were already developing voter ID laws. In 2011, South Carolina enacted a law that required a photo ID but permitted voters with a "reasonable impediment" to vote without showing identification.[107] Although South Carolina designed a voter ID law that was less stringent to appease the preclearance requirements, information defining a "reasonable impediment" was difficult to find and thus created the possibility of misunderstanding eligibility.[108] Additionally, South Carolina's election commission added to potential confusion by communicating inaccurate guidelines of the state's rules, which led a poll worker to express concern that the poor information campaign of South Carolina officials would ultimately lead to poll workers turning away voters who would indeed be eligible to vote.[109] As the contemporary cases of Alabama and South Carolina demonstrate, voter ID laws exemplify modern efforts to evade federal voting laws, leading to the disenfranchisement of African Americans.

B. Voter Purging

Voter purging, or the process of removing the voter rolls of ineligible voters or duplicate records, is another contemporary method used by states to sidestep Federal voting protections.[110] Similar to the discriminatory laws that pervaded the South in the 1800s, elections officials also maintain considerable discretion in the purging of voters, which opens opportunities for discrimination. In 2013, election officials in Virginia identified and set to purge the names of

[107] Hasen, R. L. (2016). Softening Voter ID Laws through Litigation: Is It Enough. *Wis. L. Rev. Forward*, 100.
[108] https://thinkprogress.org/south-carolina-voters-are-getting-misleading-instructions-about-voter-id-52ee1b6bc3db
[109] See supra note 94
[110] (2012, June 26). Retrieved from https://www.brennancenter.org/analysis/purges

57,000 registered voters from the state's election rolls after the Board of Elections determined they were no longer living in the state and had registered elsewhere.[111] However, county officials soon learned several errors permeated the list, which introduced the possibility of disenfranchisement for eligible voters.[112] Virginia is one of several states that uses the Interstate Voter Registration Crosscheck (IVRC) to conduct purges, despite the system's propensity for inaccuracy and flawed methodology. African-American, Latino and Asian names predominate the IVRC matching process, which is apt to list out common last names, which racial minorities over represent.

The racial and discriminatory intent of the IVRC system would seemingly align with the past motives of Kris Kobach, who is the designer of IVRC and the Kansas Secretary of State. Kobach has also launched a system to track foreign travelers[113] called the National Security Entry-Exit Registration System, which was later shut down after concerns about racial profiling.[114] Additionally, Kobach designed Arizona's stringent immigration law that many have claimed is discriminatory because the law allowed police to pull over drivers and ask for proof of their legal status. Although many states like Virginia maintain that voter purging is necessary to challenge fraud, the IVRC program that several states use to conduct these purges suggests that the true intent is discriminatory.

C. Gerrymandering

As was the case before the VRA, gerrymandering continues to be a strategy that is commonly used throughout the South to dilute minority voting strength. The selection of court

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[111] (2013, November 25). Retrieved from https://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance
[112] ibid
[113] Palast, G. (2016, August 24). The GOP's Stealth War Against Voters. Retrieved from http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890
[114] ibid

judges in Baton Rouge, Louisiana reveals contemporary gerrymandering, as the city elects from two separate districts, which are known as election districts. Section 1, which is comprised of a majority Black population, elects two judges; while Section 2, which is majority white, selects three judges.[115] Therefore, although African Americans constitute more than 60% of Baton Rouge's population, white voters control 60% of the election of judges. Thus on October 18, 2012, Kenneth Hall challenged Baton Rouge's election system in a lawsuit against the State of Louisiana, Governor Piyush "Bobby" Jindal, Attorney General James "Buddy" Caldwell, and Secretary of State Tom Schedler. He claimed that the method of electing judges to the City Court was unlawful and a violation of section two and five of the VRA.[116] Hall's legal team presented extensive evidence about the challenges that African Americans voters face in winning judicial elections, the ongoing pattern of racialized voting, Louisiana's long history of voting discrimination and a new plan to draw a majority black district that would allow African American candidates the ability to elect candidates of their choice. However, following the Supreme Court's ruling in *Shelby County v. Holder*, the Court dismissed Hall's claims under Section 5 in 2013, and later in 2015 the District Court ruled in favor of defendants. Yet, before the plaintiffs could appeal, the Louisiana legislature passed a new districting plan that met the majority of the plaintiff's requests rendering, an appeal moot.

D. Voter Intimidation

Although the presence of the Ku Klux Klan has dissipated throughout the United States, intimidation remains a contemporary tool for discouraging African Americans from voting. In 2016, several civil rights groups asserted that a decision to switch a polling location from a gym to the County Sheriff's office in Macon County, Georgia, which has been the focus of racial

[115] https://lawyerscommittee.org/project/voting-rights-project/
[116] https://lawyerscommittee.org/wp-content/uploads/2015/06/0423.pdf

profiling and discriminatory conduct claims was intended to dissuade African Americans from turning out to vote.[117] Election officials countered that the polling move resulted because the gym was under construction and was not discriminatory.[118] However, under Georgia law, polling location changes must published, which did not happen in Macon County, and voters received the opportunity to block the move if 20% of the precinct signed a petition. The petition eventually gathered enough signatures, and Georgia Board of Elections reversed an earlier decision to relocate to the Sheriff's Office.[119]

VI. Conclusion

In the immediate wake of the Shelby County decision, President Obama described the Supreme Court's ruling as "deeply disappointing,"[120] while others lamented that one of the nation's most important and effective civil rights laws was effectually gutted.[121] Yet, the Supreme Court's decision was perhaps predictable given that opponents of racial egalitarian measures have historically used the same arguments to strike them down.[122] For example, in *Northwest Austin, Municipal Util. Dist. No. One* v. *Holder* (2009) where the Supreme Court first hinted at a readiness to declare preclearance as unconstitutional, Justice Clarence Thomas wrote that the time had come for racial minorities to cease being special favorites of the law, which almost precisely mirrored the Supreme Court's assertions immediately after slavery. In 1883, the court proclaimed, "When a man has emerged from slavery…there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special

[117] http://www.41nbc.com/2016/04/18/civil-rights-groups-upset-polling-location-change-macon-bibb/
[118] Ibid
[119] Voting Rights Communication Pipelines: Georgia after Shelby County v. Holder. (2016, June 21). Retrieved June 02, 2017, from https://lawyerscommittee.org/georgiavra2016/
[120] Liptak, Adam. "Supreme Court Invalidates Key Part of Voting Rights Act." The New York Times. June 25, 2013. http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html.
[121] Richard, Wolf, Heath Brad, and TODAY USA. "Ruling resets voting rights fight." USA Today, n.d., Academic Search Premier, EBSCOhost (accessed January 21, 2017).
[122] Hutchinson, D. L. (2008). Racial Exhaustion. *Wash. UL Rev.*, *86*, 917.

favorite of the laws".[123] Justice Thomas' conclusions in *Northwest* seemingly expressed the majority's opinion in *Holder* that times have changed following increases in minority registration and political participation. However, after the Shelby County decision Southern states are continuing to devise laws that sidestep Federal voting legislation and aim to disenfranchise African Americans. Therefore, while times have indeed changed in some regards, there continues to be several elements that have remained consistent. An analysis of the discriminatory laws that initially led to the VRA demonstrated the similarities to contemporary laws, revealed the stubbornness of Southern states to honor federal voting laws and exhibited how the Supreme Court wrongly invalidated section 4 of the VRA even as discriminatory practices have spread beyond the South.

VII. Policy Recommendations

After the initial challenges that the VRA was unconstitutional, The Supreme court upheld the legislation in 1966 concluding, "exceptional conditions can justify legislative measures not otherwise appropriate".[124] The continuation and expansion of voting discrimination in the South and across the United States demonstrates that exceptional conditions continue to persist and case-by-case litigation remains an inadequate remedy. The following policy recommendations contain solutions with varying degrees of political feasibility, but each provides options to make voting more accessible in the United States.

Option 1: Update the Voting Rights ACT

The perseverance of voting suppression methods in the South and the expansion of discriminatory voting laws across the country demonstrates the need to update the VRA. Although The Voting Rights Amendment Act of 2014 and the Voting Rights Advancement Act

[123] Barnes, M. L., Chemerinsky, E., & Jones, T. (2009). A post-race equal protection. Geo. LJ, 98, 967.
[124] ibid

of 2015 failed to garner a vote during their congressional sessions,[125,126] they each offer potential outlines for updating the VRA. Specifically, each of these bills would update the coverage formula to include states outside of the South and would authorize the DOJ to bail-in states to the preclearance requirements for findings of discriminatory intent or result[127]. Presently, Section 3 only permits the DOJ to bail-in states if they intentionally discriminate, which is often difficult to prove. Although improving the VRA would be helpful with counteracting contemporary voting discrimination, modernizing the VRA has become a partisan issue, which makes fulfilling the Supreme courts requests in *Holder* to update the preclearance requirements politically infeasible.

Option 2: Implement a National Automatic Voter Registration system

A national system would automatically register every American to vote when they are eligible and ensure that people stay on the voter rolls when they move, which reduces registration inaccuracies and further limits the minimal chance of fraud,[128] which the discriminatory Voter ID laws and Voter purging systems claim to do. Additionally, a national automated system would grant everybody the option to opt out and would specifically address research that indicates that one in four eligible citizens in the United States is unregistered to vote[129]. In 2015, Oregon became the first state to register voters automatically and the state has experienced a quadrupling of registration at the DMV. [130] With seven other states following Oregon's lead and

[125] H.R. 3899 — 113th Congress: Voting Rights Amendment Act of 2014." www.GovTrack.us. 2014. January 22, 2017 <https://www.govtrack.us/congress/bills/113/hr3899
[126] H.R. 885 — 114th Congress: Voting Rights Amendment Act of 2015." www.GovTrack.us. 2015. January 22, 2017 <https://www.govtrack.us/congress/bills/114/hr885
[127] Daniels, Gilda, William R. Yeomans, Nicholas Stephanopoulos, Gabriel Chin, and Samuel R. Bagenstos. "The Voting Rights Amendment Act of 2014: A Constitutional Response to Shelby County." (2014).
[128] Brennan Center for Justice, The Case for Automatic Voter Registration, https://www.brennancenter.org/sites/default/files/publications/Case_for_Automatic_Voter_Registration.pdf
[129] Ibid
[130] See supra note 129

implementing automatic voter registration, and with several states considering similar legislation across the county, a national automatic voter system is increasingly politically feasible.

Option 3: Enact a Constitutional Amendment

To curb the persistence of evasions of federal voting protections and the disenfranchisement of African American voters, a federal constitutional amendment that grants every citizen the right to vote is necessary. While many Americans believe that they have the explicit right to vote, the constitution contains no promises[131]. In 2017, several senators introduced a House joint resolution that would grant, "Every U.S. citizen of legal voting age the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides is necessary" and provide Congress with the power of enforcement[132]. With an affirmative right to vote, Congress would have the power to ensure that every vote is counted and that states follow established standards. Yet, despite recent efforts to pass a constitutional amendment, this is likely the least feasible of the recommendations because Congress has only modified the constitution 27 times since the inception of the document more than 200 years ago. Although felony disenfranchisement is beyond the scope of this analysis, it is important to note that the 2017 proposal is also likely infeasible because the resolution would enfranchise people with felony convictions, which currently only Maine and Vermont authorize.

[131] Reps. Pocan and Ellison Introduce Right to Vote Constitutional Amendment. (2017, February 16). Retrieved June 02, 2017, from https://pocan.house.gov/media-center/press-releases/reps-pocan-and-ellison-introduce-right-to-vote-constitutional-amendment

[132] ibid